No. 10,189

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMPIRE OIL AND GAS CORPORATION (a corporation), and CHESTER WALKER COLGROVE, trading as Colusa Products Company,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' REPLY BRIEF.

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INTRODUCTION.

Herein we will reply to appellee's argument concerning the following three points:

(I) INSUFFICIENCY OF THE EVIDENCE.

(II) DR. VON HOOVER.

(III) DUPLICITY.

These three matters take up practically all of appellee's lengthy Reply Brief. The various other important points covered in our Opening Brief have received scant, if any, attention in appellee's brief, and therefore no further argument will be made herein concerning them.

(I) RE INSUFFICIENCY OF EVIDENCE TO SUPPORT CONVICTION.

(See Appellee's Br., pp. 14-36);

(See Appellants' Br., pp. 6-33).

In our Opening Brief we undertook to show not only that the Government had failed to sustain its burden of proving, by competent *factual* evidence, its allegations as to the lack of efficacy of these Colusa products, but that, on the other hand, the clear-cut and uncontradicted evidence of the defense completely refuted these charges of the Government and demonstrated the efficacy of these products (even though the burden was not upon the defense to so demonstrate).

(a) Incorrectness of Government's intimation that defense proof was limited to psoriasis.

The Government, in its reply, intimates that while the evidence may show that these Colusa products are efficacious in the treatment of *psoriasis,* there was no such proof as to these other skin diseases covered by the information. Appellee does not even attempt to show how or why such intimation is justified or correct. It clearly is not. The truth is that the factual evidence of the defense covered *all* the skin diseases named in the information. The evidence of the user witnesses and that of the medical witnesses called by the defense covered *all* of these skin diseases and clearly showed the efficacy of these Colusa products in the treatment of these diseases.

(b) Government's argument regarding "restoration of skin" is sheer sophistry.

The second argument resorted to by appellee is that while the evidence may show that appellants' products are efficacious in the treatment of these skin diseases,

still the evidence does not show that these products *will restore the normal skin surface,* and hence this particular allegation of the information has not been refuted. Our answer to this is threefold.

In the first place, the burden was and is upon the Government to prove, *by competent factual evidence* and beyond a reasonable doubt, the truth of this charge. This it failed to do. In short, the burden was not upon the defense to disprove or refute this allegation.

In the second place, while the burden was not upon the defense to disprove this charge, the defense did so. It introduced a large amount of clear-cut factual evidence to show that Colusa Oil actually does conquer these horrible skin diseases, and *does aid in restoring the normal skin surface.* Witness after witness exhibited their arms, hands and other portions of their bodies to show their *now* clean and normal skins, which, but a few months before, had been repulsive masses of scales and sores; skins which had been grievously afflicted with these supposedly incurable diseases; and skins which were completely cleared up in a very short time by this Colusa Oil. What has the Government to say in its brief about this and similar equally cogent and unimpeached evidence? Absolutely nothing!

In the third place, this particular argument of appellee can, with all propriety, be properly classified, we respectfully submit with all due deference, as sheer sophistry. Realizing its inability to answer or explain away the aforementioned clear-cut factual evidence, appellee seizes upon one very insignificant bit of testimony (of Dr. Vincent, a defense witness), and attempts to use it as proof of its contention regarding "restoration of skin surface". We will now undertake briefly to show the utter sophistry and flimsiness of this argument of the Government.

Dr. Vincent (Tr. 96-109), one of the defense witnesses, testified that in the course of his medical practice at Houston, Texas, he had successfully treated hundreds of cases of these skin diseases with these Colusa products. Apparently the Government, in its efforts to find dissatisfied users among these many patients of this kindly and able old physician, had to rest content with one Guidry, a man who admitted that when he first treated with Dr. Vincent his skin disease was so bad and so repulsive he was ashamed to go upon the street. (Tr. 265.) This man suffered from the disease called acne. That disease, even when cured, usually leaves small "pox" or indentations on the portion of the skin which has been affected by the disease. On his cross-examination, Dr. Vincent stated that Colusa Oil did not and could not eliminate these depressions in the skin. (Tr. 260, 261.)

The Government, in its effort to find something to justify its case, seizes upon this bit of testimony of Dr. Vincent and triumphantly proclaims (Appellee's Br., p. 32) that this evidence *conclusively* proves the truth of its claim that Colusa Oil does not restore the normal skin surface. The simple answer to all of this is that *at no time did appellants ever advertise that Colusa Oil would eliminate the indentations caused by acne.* Nowhere in appellants' advertising matter will any such claim be found. Appellee has not and can not point to any such assertion.

As a matter of fact, the sole and *only* reference in appellants' entire advertising matter to "restoration of skin surface" is the very mild and conservative remark that:

> "Its detergent and mild antiseptic action inhibits the spreading of skin irritations and *helps* to restore the normal skin surface." (Tr. 24.)

Obviously, no reference of any kind is made in this statement to the indentations caused by acne. Incidentally,

it might also be noted that, as Judge Denman pointed out at the oral argument, the mere fact that the indentations of acne are not eliminated does not mean that the skin surface covering these indentations is not restored. It, of course, is restored just as the skin surface is restored and rebuilt over the "pox" left by smallpox.

Furthermore, as pointed out hereinabove, the uncontradicted factual evidence of the defense clearly and indisputably shows that this Colusa Oil has actually restored the normal skin in various difficult cases of psoriasis and other skin diseases.

Therefore, it is clear, we respectfully submit, that this argument of appellee as to "restoration of skin surface" is sheer sophistry and utterly unsound.

We are dealing, in this case, with some of the most obnoxious and nerve racking and wrecking diseases with which the human body can be afflicted. As to most of these diseases, the medical profession frankly admits it has no cure, or even an effective treatment. Colusa Natural Oil indubitably has brought great relief (not to mention cures) to hundreds and thousands of persons afflicted with these diseases. Yet we find the Government (and its Pure Food and Drug officials), in the face of these undeniable facts, trying to sustain a conviction of the people who have made possible this widespread relief from misery, by resorting to the utterly flimsy claim that appellants should be branded as criminals because their oil did not remove the "pox" from Mr. Guidry's skin!

(c) Re Government's argument as to "germicidal powers".

Appellee's third and last contention is that the conviction can be sustained upon the basis of its charge that appellants represented these products to be *germicidal.* Here again, the entire argument of appellee is, we respectfully submit, plainly unsound and specious.

In the first place, *at no time did appellants represent in their advertising matter, or otherwise, that these products were germicidal.* This charge in the information (like the aforementioned claim of the Government that appellants in effect represented that these products would eliminate the indentations incident to acne) is a bald conclusion of the Government, and not a statement or representations of appellants. Incidentally, this illustrates the vice of this particular information. The Government, if it desired fairly to present clear-cut issues of fact, could have (and should have) picked out and set forth in its information *the exact statements of appellants* which it claimed and asserted to be false. Instead, it set forth various bald conclusions drawn by the Government's attorneys.

This is well illustrated by the phase with which we are now dealing. At the tail end of the quite illegible newspaper mat (Gov. Ex. 8; Tr. 27) is the statement:

> "Science papers by eminent physicians state that: 'Radium emanation is accepted as harmoniously in the body as is sunlight by the withering plant.' 'The emanation is taken up in the blood and as quick as lightning, goes to all parts of the body where it kills or checks the disease germs.' " (Tr. 27.)

Now, turning to the information, we find *a portion* of this statement quoted in the information, viz.:

> "Radium emanation is accepted as harmoniously in the body as is sunlight by the withering plant."
>
> "The emanation is taken up in the blood and as quick as lightning, goes to all parts of the body where it kills or checks the disease germs." (Tr. 6.)

It should be noted that the introductory portion, viz., "Science papers by eminent physicians state that" was entirely omitted from the information.

The aforementioned excerpt about "radium emanations" is the entire foundation of the Government's argument as to *germicidal* powers. In other words, the Government seizes upon this insignificant excerpt from appellants' advertising matter and attempts to contort it into a representation that appellants' products would kill or check disease germs. In order to do this, it conveniently omits the introductory portion showing that appellants were *merely quoting from medical authorities.* And, surprisingly enough, when appellants sought to prove the truth of this quotation by showing the source of these quotations, that is, the eminent scientists and specialists on the subject of radium who had uttered these pronouncements, the Government strenuously objected (and the court sustained the Government) on the ground that the source or verity of these quotations was immaterial. (See Appellants' Op. Br., pp. 61-62.)

Our first answer, therefore, is that the Government has not even proved the first requisite of its charge, i. e., *that the defendants represented Colusa Natural Oil to be germicidal.*

Likewise, the Government has wholly failed to prove the second indispensable phase of this charge, i. e., that such representation was and is untrue. The only factual evidence introduced by the Government on this phase was the testimony of two bacteriologists who testified that their tests showed that this oil would not kill or inhibit *two* germs, out of millions of germ cultures which exist. (See Appellants' Op. Br., pp. 12-13.) These two germs have nothing whatsoever to do with psoriasis or various others of these skin diseases.

Furthermore, in connection with this "germicidal" phase of the matter, it might also be noted that while there is absolutely no basis for the Government's claim

that appellants represented that Colusa Natural Oil would kill or check disease germs, and while the Government failed to show by competent factual evidence that Colusa Natural Oil is not germicidal, still, even if the defendants had expressly represented in their advertising matter Colusa Natural Oil to be germicidal, the uncontradicted factual evidence in this case would clearly have sustained such representation and shown the truth thereof.

Why is this so? Because the factual evidence in this case clearly shows, without contradiction, that this Colusa Natural Oil *has the power to, and does, check and kill the micro-organisms which cause these skin diseases.* It utterly destroys them. It did so in Mr. Fazio's case, and in the many other cases covered by the defense evidence.

The medical profession seems to be in doubt as to whether it should classify these micro-organisms as *animal* or *vegetable.* As a matter of fact, it knows very little about them. Of course, to the poor afflicted sufferer it makes little difference in which of these categories the pedagogues classify these organisms. These unfortunate sufferers are, of course, interested in checking, and if possible, getting rid of these organisms and their afflictions. And Colusa Natural Oil does this. The record plainly shows this.

The learned author of the Government's brief apparently is under the mistaken impression that a drug is not germicidal unless it will kill those disease germs which can be classified as "animal" disease germs. This, of course, is erroneous and a misconception.

As a reference to any standard dictionary will show, a germicide is *any substance* which destroys micro-organisms, otherwise known as germs. For example, Webster states:

"Germicide—Any substance or agent which destroys micro-organisms." (Webster's New International Dictionary.)

What is a germ? A germ is *any* micro-organism, *either animal or vegetable.*

"Germ—(1) A small mass of living substance capable of developing into *an animal or plant* or into an organ or part; an embryo in its early stages; a sprout or bud; a seed.

(2) Biol. The germ cells considered collectively, as distinguished from the somatic cells, or soma.

(3) Hence, in popular usage, any micro-organism, esp. any of the pathogenic bacteria; a microbe; a disease germ." (Webster's New International Dictionary.)

"Bacteria—A remarkable group of vegetable micro-organisms of the class Schizomycetes. They are widely distributed, occurring in air, water, and soil, as well as in the bodies of living animals and plants and in products derived from them." (Webster's New International Dictionary.)

Therefore, it being clearly shown by the record that Colusa Natural Oil does kill and check the micro-organisms (whether they be classified as animal or vegetable) which cause these obnoxious skin diseases, the entire argument of appellee as to this phase falls to the ground.

Incidentally, before concluding this phase, we desire to advert to certain other statements made in appellee's brief. At the top of page 18 of its brief, appellee states, with reference to the aformentioned quotation regarding "radium emanations" that:

"This is an extravagant claim without the slightest foundation."

As shown above, when we sought to show that eminent medical experts, specialists in radium, had made

the very statements in authoritative works, the Government blocked such proof. The Government's own witness, Dr. Kulchar, admitted that this statement regarding radium emanations is at least *partially true.* (Tr. 72.) His theory is that if a radioactive element gets into the bloodstream "it will be taken by the blood and will destroy cells, not germs; it will not kill germs".

Germs, of course, are cellular structures, and it is little short of fatuous for this so-called expert to assert that germs cannot be killed by radium. *It is being used every day for this purpose.* The moment this "expert" conceded that it could and does kill cells, he likewise must admit that it can and does kill germs.

Dr. Frederick Fender, another Government witness, testified that radium *does kill disease germs:*

> "I know very little about radium; the trouble with radium is that it kills tissue just as well as it does germs, so it has to be used with a good deal of restraint." (Tr. 76.)

We find, therefore, that even on this wholly immaterial and irrelevant matter injected into this case by the Government, the Government's own evidence is in a hopeless state of confusion.

We respectfully submit, therefore, that appellee has wholly failed to show or establish that the evidence in this cause is sufficient to sustain the conviction herein. To the contrary, the evidence does not at all meet or fulfill, we respectfully submit, the requirements set forth in the authorities cited at page 8 of our Opening Brief.

Incidentally, it should be noted that appellee makes no effort whatsoever to answer or reply to the various authorities cited in our Opening Brief (pp. 27-30) as to the weakness of "opinion" testimony of experts.

In this connection, we desire to refer to the case of *Fulton v. Fed. Trade Commission,* 130 Fed. (2d) 85, which was mentioned by Judge Healy at the oral argument. As we understand that case, it simply stands for the rule that medical experts may voice their opinions as to the therapeutic value of a drug even though they have not used it. In other words, it holds that such evidence is *competent.* Our case involves an entirely different question. Assuming for the sake of argument that the Government's experts were properly permitted to voice their opinions as to the efficacy of Colusa Natural Oil (i. e., that such opinions were *competent*), the question in our case is whether such evidence is sufficient to sustain this conviction when arrayed against it is a mass of clear-cut and uncontradicted *factual* evidence clearly establishing the efficacy of appellants' products.

(II) RE DR. VON HOOVER.

(See Appellee's Brief, pp. 36-65.)
(See Appellants' Op. Br., pp. 33-49.)

We are confident that the Government now fully appreciates the erroneous nature of its objection (and the court's ruling) that Dr. Von Hoover was not qualified to testify as an expert for the defense *because he was not an M. D.* Instead of attempting to uphold the correctness of this objection and this ruling, appellee now seeks to show that even if this ruling was erroneous, still this Court should not reverse, because the error was and is not sufficient to *"shock the conscience of this Honorable Court".*

Our answer to this is that there is no such rule of law as this one contended for by appellee. This "shock the conscience" contention is, we respectfully submit, legally

untenable. The settled law is that if this error of the lower court in rejecting Dr. Von Hoover's testimony was prejudicial (i. e., on an important and material phase of the case), this Court should undo that error by reversing the judgment.

Appellee devotes pages 36 to 65 of its brief to this Dr. Von Hoover matter. All but approximately eight pages are taken up by quotation from the record. (Appellee's Br., pp. 36-57.) At pages 57 to 65, appellee attempts to establish several points with respect to this witness. We will now briefly answer these.

In the first place, the Government seeks to make capital out of the fact that the witness could not recall exactly certain formulae incorporated in one of the pharmacopoeiae. Appellee seeks to show, by various trivial excerpts from the record, that the exclusion of the testimony of this highly trained and competent pharmacologist was proper because he could not offhand recall certain technical formulae. With all due deference, we respectfully submit that such a contention is little short of fatuous. As Judge Stephens pointed out at the oral argument, to expect a doctor or other technical man to keep in his head all of these various chemical and other formulae is about as foolish as to expect a lawyer to keep in mind all the technical legal matters incorporated in his various reference books. As Dr. Von Hoover aptly expressed it during this cross-examination:

> "I am not qualified to quote everything from a book, any more than you can quote all the law." (Tr. 154.)

This pharmacopoeia referred to by Government's counsel contains thousands of formulae and other technical references and statements, and to expect a pharmacologist or other medical men to have these readily in mind

is, we respectfully submit, absurd. Had we undertaken to examine Dr. Tainter (professor of pharmacology called by the Government) in a similar manner, we no doubt would have been chided by counsel and further rebuked by the court for indulging in such a frivolous examination.

Incidentally, it might be noted that Dr. Von Hoover, in replying to counsel's questions as to sulphur ointments, stated that there are *several* such ointments. (See Tr. 152.)

Appellee also seeks to show, as a justification for the exclusion of the testimony of this very important defense witness, that he was not conversant with certain other alleged technical facts. Our answer to all of this is that the witness showed a remarkably complete knowledge of all phases of his science. His long training and extensive experience in his field of the medical and pharmacological science was and is such that he was by far the most competent expert witness produced at this trial. Counsel for appellee seems to be shocked because Dr. Von Hoover classified the mite which causes mange as probably being of vegetable origin. (See Appellee's Br., 58.) He points to this as "an obvious, simple and conclusive indication of his gross incompetence".

In the first place, there is not the slightest attempt by appellee to show why it is incorrect to classify the mange mite as *vegetable*. There is absolutely nothing in the record to show that such a classification is incorrect.

In the second place, Dr. Von Hoover specifically stated that insofar as the mange mite is concerned, scientists do not know just how this should be classified, viz.:

> "Q. It is of vegetable origin?
>
> "A. It is probable, but in follicular mange we don't know, because we don't know how the mite ever got on the dog. The Demodex Folliculorum attacks the dog." (Tr. 156.)

If this was such an unfounded statement, why did not the able counsel for the Government *put on rebuttal testimony to refute it?* The answer is that the Government did not and could not refute this statement.

Furthermore, all of this tweedledum and tweedledee about *animal* and *vegetable* is, we respectfully submit, just so much smoke screen and nonsense. Particularly when it is a recognized fact in the biological and bacteriological science that eminent scientists admit that the borderline between these categories is a confusing and indefinite one. Webster also aptly epitomizes this situation:

> "Plant—Any member of the group of living organisms exhibiting irritability in response to stimuli, though generally without voluntary motion or true sense of perception; a vegetable in the broad sense, as distinguished from an animal. *Owing to the close relationship between the lower members of the animal and vegetable kingdoms, it is impossible to define plant in terms that will include all plants and exclude all animals.*" (Webster's New International Dictionary.)

Incidentally, in connection with the foregoing, it might also be noted, in passing, that appellee has nothing to say about its own witness, Dr. Tainter, the pharmacologist, who, after freely voicing opinions as to the lack of efficacy of Colusa Natural Oil in the treatment of psoriasis, expressly disclaimed, on cross-examination, much knowledge about the subject. (Tr. 61.) Likewise, appellee has nothing to say in reply to our comments regarding Dr. Kulchar, who likewise, after glibly voicing opinions as to the lack of efficacy of this oil in psoriasis cases, likewise belatedly confessed on cross-examination: "I do not wish to qualify as an expert on psoriasis." (Tr. 75.)

And yet, appellee seeks to have appellants branded as criminals on the basis of such so-called evidence!

At the top of page 59 of its brief, appellee quotes from Dr. Von Hoover's testimony concerning fungus. The doctor stated that schizomycetes is a vegetable classification. *And that is exactly what it is.* Yet appellee seeks to make it appear that such testimony indicates the ignorance of his witness. Here again we find *not the slightest effort by appellee to point to any evidence in the record refuting or in any manner impugning this testimony.* The simple truth is that the *schizomycetes* are properly classified as vegetable.

At the bottom of page 59 of appellee's brief, it seeks to distort certain testimony of Dr. Von Hoover into an admission that he does not have a proper knowledge of bacteriology. This particular argument of appellee requires little comment. As the witness testified on direct examination (Tr. 113-115), he has had an extensive training in this science, and he displayed a wide and excellent knowledge of it during his examination in this case. What the witness obviously meant by his aforementioned answer, thus seized upon by appellee, is that *he was not actually practicing the profession of a bacteriologist,* and that such bacteriological work as he does is incident to, and a part of, his professional practice as a pharmacologist. In short, his answer is equivalent to a dentist (thoroughly skilled and trained in radiology) stating that he is not a practicing radiologist, but only uses that science as an incident to his dental practice.

At page 60, appellee seeks to make it appear that the court permitted Dr. Von Hoover to testify at length. The truth is that we could not even *get started* with the important testimony of this witness. Dr. Von Hoover had carefully collected a mass of *factual data* directly bearing on the fundamental issue in this case. This data comprised the *facts and results* actually observed by him in his extensive clinical tests of Colusa Natural Oil in many

cases of the very skin diseases involved in this case. The court, however (due to Government's objection that this man was not an M.D.) *would not even permit him to testify as to these skin diseases;* that is, would not even permit him *to identify a case of psoriasis, leg ulcers,* etc. The excerpt from his testimony as to the *A. Nelly* case is illustrative of this. (See Appellants' Op. Br., p. 41.) How could we have this witness describe the results accomplished in various cases of psoriasis *if the court would not even permit him to testify that these people were suffering from psoriasis?*

The truth is that the Government, by its erroneous objection based on the premise that this man was not an M.D., and the court by its erroneous ruling predicated on the same ground and by its unfair comments, completely destroyed the usefulness of this very vital defense witness.

Appellee must have felt hard pressed, we respectfully submit, for satisfactory material for a reply argument, when it found it necessary to resort to such captious, trivial and specious arguments as those aforementioned. And, in connection with all of these trivialities which appellee resorts to in its effort to justify the exclusion of Dr. Von Hoover's testimony, it should also be noted that the lower court, in making its various erroneous rulings excluding the testimony of this vital defense witness, *did not even have in mind or consider these matters now referred to by appellee.* Nor were they in the mind of the Government counsel when he erroneously objected to this defense witness *on the ground that he was not an M.D.* Why is this true and indisputable? Because these trivial bits of testimony now referred to by appellee occurred long *after* all these erroneous rulings were made. In fact, they occurred at the very end of Dr. Von Hoover's cross-examination (Tr. 154-155), and *after* the last of

these many rulings made by the trial court. The simple truth is that both the court and appellee proceeded and acted, in the court below, solely upon the erroneous premise that this witness could not testify because he was not an M.D.

Appellee seeks to make it appear that one of the principal points in issue with respect to the Dr. Von Hoover phase is the question as to the admissibility of Exhibits L, M and N (the reports). Nothing could be more incorrect. The matter as to these reports was and *is purely incidental and secondary* (though important) when compared to the broader and more important aspects of this Dr. Von Hoover matter, as is shown by our Opening Brief. (See pp. 33-49.)

At pages 38 and 39 of our Opening Brief, we pointed out, incidentally, that we were even prevented from using these detailed memoranda *to refresh the witness' recollection as to many of the detailed facts with respect to these therapeutic tests.* These memoranda were compiled by Dr. Von Hoover at a time when these facts were fresh in his mind, and in this and every other respect they fully qualified as memoranda which properly could be used to refresh the witness' recollection. However, the court even prevented this.

Appellee's final argument with respect to this Dr. Von Hoover phase is that it was a matter of discretion with the trial court as to whether or not it would permit this witness to testify as an expert. At pages 61 to 64 of its brief, appellee cites various authorities to support this argument. Our answer to this is three-fold.

In the first place, the ruling of the trial court that this man was not qualified to testify as an expert because he was not an M.D. is so plainly erroneous and so obviously prejudicial and an abuse of discretion as to require, we respectfully submit, little further comment.

In the second place, the authorities cited by appellee all show that the discretion vested in the court is not an unfettered one but is a limited one. If there ever was an abuse of discretion, it occurred, we respectfully submit, when the trial court in this case prevented this highly skilled and trained pharmacologist from testifying as to these matters so peculiarly within the scope of his science, and so vital to the fundamental issues in this case. And it must be borne in mind that his testimony was not to consist only of *"opinion"* testimony. To the contrary, it was to cover a large mass of *important factual data* bearing directly upon the vital issue as to whether or not Colusa Natural Oil is efficacious in the treatment of psoriasis and these other skin diseases.

Most (if not all) of said authorities cited by appellee involve so-called "opinion" evidence *only,* and none of these cases bears any resemblance to ours.

In the *Morton Butler Timber Co.* case (91 Fed. (2d) 884; Appellee's Br. 61), not only was "opinion" testimony alone involved, but the trial court actually *admitted* such testimony.

The case of *Clark v. Hot Springs Electric Light & Power Co.* (55 Fed. (2d) 612; Appellee's Br. 61), in stating the various grounds upon which the decision of a trial court as to expert witnesses should be upset by an appellate court, mentions the following: (1) Plain error of law; (2) Serious mistake of fact; (3) Abuse of discretion. The ruling of the trial court that Dr. Von Hoover was not qualified to give either "opinion" or "factual" evidence herein, because he was not an M.D., falls clearly, we respectfully submit, within both the first and third of said categories aforementioned. Likewise, if any attempt is made to justify this ruling on the ground that the record does not show Dr. Von Hoover to be sufficiently qualified to testify as a pharmacologist, then

such ruling likewise clearly falls within the second category above mentioned, i.e., a serious mistake of fact.

The *Hamilton* case (297 Fed. 422; Appellee's Br. 62), was simply an "opinion" case. The same is true of the *Springs Company* case (99 U. S. 645; Appellee's Br. 62.)

In the *Stilwell* case (130 U. S. 520; Appellee's Br. 62), the trial court prevented a witness from expressing an *opinion* as to the rental value of a mill he had never seen, and about which he knew nothing. Can this be likened at all to the situation involved in our case with respect to Dr. Von Hoover?

The *Inland and Seaboard Coasting Company* case (139 U. S. 551; Appellee's Br. 63), likewise is clearly distinguishable. Certain *opinion* testimony was excluded (i.e., whether or not a certain position near a wharf was a reasonably safe place). The witness had never seen this wharf. The upper court, in refusing to reverse, pointed out that this question as to whether the place was a safe one was a question which the jury could decide for itself, and as to which no special training or experience was necessary. The court concluded, therefore, that as to this point "no opinion of witnesses was admissible".

The *Chateaugay Ore and Iron Company* case (144 U. S. 476; Appellee's Br. 63) likewise involved "opinion" evidence. On the particular facts shown, no abuse of discretion appears.

The last case cited by appellee, *Bradford Glycerine Co. v. Kizer* (113 Fed. 894; Appellee's Br. 63) is likewise an "opinion" case and, on the particular facts involved, there was no showing of error or abuse of discretion.

At the conclusion of its citation of these authorities, appellee makes the statement (p. 65) that the court had the right to require that "the appellants' evidence in the expert field be of equal competence to that adduced by

the Government''. This argument is both legally unsound and factually incorrect. Appellee cites no authorities to sustain this statement and we know of none.

Furthermore, not only was Dr. Von Hoover of *equal competence* with the so-called experts called by the Government, but the record plainly shows that he was and is *much more competent,* insofar as the fundamental issues in this case are concerned, than at least nine of the ten witnesses called by the Government. Not one of these nine was a pharmacologist. The fundamental issue in this case (i.e., the therapeutic efficacy of appellants' drugs) was and is one peculiarly within the very scientific field for which this witness was highly trained and in which he has had so much valuable experience.

As to the other witness, Dr. Tainter, the Government's pharmacologist, Dr. Von Hoover was and is far more qualified and competent to testify concerning the efficacy of Colusa Natural Oil in the treatment of these skin diseases than Dr. Tainter, for the very simple reason, among others, that Dr. Tainter made no tests whatsoever of this oil upon these skin diseases, and hence was not able to give any factual evidence at all as to such treatments.

In the face of these indisputable facts, how can appellee with any hope of success, say that these Government witnesses were more competent as witnesses than Dr. Von Hoover?

Appellee also says that appellants should have called Dr. Von Hoover's clinical assistants instead of Dr. Von Hoover. The fact is, of course, that because of his training and experience in the pharmacological science, this witness was and is far mode competent, insofar as the issues involved in this case are concerned, than Major Burby, his veterinarian, or Dr. Beal, the U. S. Public

Health Officer at San Antonio, another of Dr. Von Hoover's clinical assistants. Incidentally, if we had called these other doctors to the witness stand, the Government would probably have objected on the ground that they were not qualified because they were not pharmacologists; or that they were not competent if they couldn't recall the formula for gluside, or recognize a vegetating schizomycetes if they saw one.

(III) RE DUPLICITY.

(See Appellee's Br. pp. 7-13);
(See Appellants' Br. pp. 54-58).

Appellee cites various conspiracy cases to support its answer to the claim of appellants that the third count is duplicitous. They are not in point, we respectfully submit, because it is elementary that in such cases the crime is the conspiracy and hence the fact that several means are used to effectuate its purpose does not make each of those means a separate offense.

Appellee argues, however, that in our case, the offense was the transmission, in interstate commerce, of a misbranded drug, and hence that *the transmission in interstate commerce* of the particular shipment of hemorrhoid ointment involved in the third count was the offense, and therefore the various methods or particulars in which it might have been misbranded do not constitute separate offenses.

We respectfully differ and disagree with this contention. To illustrate our position, we will first assume that a person ships a certain drug by mail in interstate commerce and that he encloses with the shipment an advertising circular which not only misrepresents the therapeutic efficacy of the drug, but also contains various ob-

scene matters. Obviously, under these circumstances, it would not be sound or proper procedure to charge this person in *one count* with misbranding (under the Pure Food and Drug Laws) and sending obscene matter through the mails (under the postal laws). Two counts would necessarily be required to conform to established legal requirements. Not even appellee could or would dispute this. Yet but one and the same shipment is involved in each count, and, under appellee's erroneous theory, this fact would justify the use of but one count.

Now, to take a case a step nearer to our own, let us assume that this same shipper transmits, in interstate commerce, a drug or food which is both misrepresented (i.e., misbranded) and likewise adulterated (let us assume that it is putrid or poisonous). Could these two matters (both of which are punishable under the Pure Food and Drug Laws) be joined in one count? We submit not. Why? Because the proof of either involves *distinct facts and different factual issues.* Under established legal principles (as exemplified by the authorities cited at pages 55-57 of our Opening Brief), if the proof of one phase involves evidence not required for the other phase, two offenses are involved and must be separately pleaded. There are very important practical reasons which justify this requirement. These are pointed out in the various authorities cited in our Opening Brief. And yet, under Appellee's theory (there being only one shipment involved), it would necessarily follow that the two offenses mentioned in the foregoing example could legally be joined in one count. But the law, for very important practical reasons, gives a defendant the right to object to and prevent such a joinder.

So, too, in our case. As shown in our Opening Brief, the two matters joined in the third count are basically different. In fact, the failure to put the weight designation on the jar label is not really *misbranding* at all, in

the true sense. It is simply an act of omission, a negative act wholly distinct and different in kind from the other alleged offense set forth in said count (i.e., an alleged misrepresentation as to the therapeutic efficacy of Colusa Hemorrhoid Ointment).

For the various legal, and the important practical, reasons set forth at pages 57 and 58 of our Opening Brief, it is clear, we respectfully submit, that the joinder of these two matters in one count was bad, and constituted duplicity.

Appellee intimates that appellants' motion to require the Government to elect was tardy and hence the denial thereof was justifiable on this ground. The case of *Guy v. United States* (107 Fed. (2d) 288; Appellee's Br. 13), does not stand for such rule.

The only possible ground for holding such a motion to require an election to be too late would, of course, be that any belated making thereof worked a prejudice to the Government. Such a claim cannot be made under the circumstances of our case. Not only was the Government not prejudiced by the fact that this motion was not made until the conclusion of the taking of the evidence, but such timing *was obviously an advantage to the Government.* Why? Because, with the evidence all in, the Government was then in a position (if required to elect) to select that phase as to which it considered its chances of conviction to be best, and to eliminate the other. Furthermore, it could then turn around and immediately file a new information concerning the phase or phases thus eliminated.

Therefore, there is neither legal nor practical ground for criticising the timeliness of appellants' motion to elect.

CONCLUSION.

Reviewing the record again, and giving consideration to the oral argument, we submit the judgment in the court below has been shown to be erroneous and should be reversed. The suggestion by appellee's counsel that this court can reverse only when the trial court's errors are shown to be such that "shock the conscience" is without substantiation in any case decided by this Circuit or any other Circuit. The Government's argument, in effect, confesses error, but says that until such error is of the magnitude indicated, this judgment should not be reversed. As long as courts of appeal in these United States continue to decide cases on well established legal principles, and reverse judgments where plain and harmful error has been committed, even so long may we expect the present administration of our federal courts to receive the approval of litigants who turn to them with expectancy of justice consistent with such established legal principles. But, if in order to secure a reversal of any case, the admitted errors of the trial court must first be shown to have been of such a nature that they "shock the conscience", then a new rule of law will have been introduced, one which might loosen a flood of evils in appellate procedure which may take a long time to correct.

The insufficiency of the evidence, and the errors committed in re Dr. Von Hoover, in the unfair attitude of the trial court, in the exclusion of the testimonials, and the other errors referred to in our briefs, compel, we respectfully submit, the reversal of this judgment.

Dated, San Francisco,
June 11, 1943.

Respectfully submitted,
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